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be entitled. Also an option to sell, given by the deceased, manifests a desire to convert his property into personalty, whether or not the option is later exercised. Giving effect to such desire would entitle the personal representatives to land. If the option was never exercised, this would result in a clear violation of all principles of devolution, since realty would descend to the personal representatives. Moreover, the facts in each case would urge a modification of any set rule.[7] Yet this could not be allowed without violating the Wills Act.

The weight of authority on this point follows the leading case of Lawes v. Bennett,[8] and adopts a middle ground, differing from either of the solutions suggested.[9] If the option is not exercised, the heir takes and retains the land; but if the option is exercised, the heir gets the rents and profits until the exercise of the option and then the proceeds go to the personal representatives. A recent case is in accord with this view. *McCutcheon's Estate*, 61 Pitts. Leg. J. 315. So vacillating a rule has obvious objections. To have the ultimate ownership unsettled indefinitely, conceivably for generations, is impracticable and unjust.[10] Many cases that follow this rule, in deference to the great authority of Lord Kenyon, have doubted it on theory.[11] If the rule is founded on reason, it should be applied also in the cases where the purchaser waives the breach of a condition by the vendor; yet it is limited to cases of options.[12] Moreover, even in cases of options, the personal representatives take nothing if there be a specific devise instead of a general devise or intestacy.[13] This may be distinguished, however, since, if the devise be specific and made after the option is given, the testator has expressed an intention to benefit the devisee to that extent. This doctrine, then, involved in Lawes v. Bennett, has been limited to those facts regardless of similarity in principle.[14] Such exceptions are simply examples of limiting the application of a bad rule of law.

THE OWNERSHIP OF LAND UNDER WATERS. — While it is a well-recognized rule of law that land under navigable[1] waters belongs to the sovereign, and land under non-navigable waters to the riparian

[7] Thus, where the option is incidental to a long term or perpetual lease, the leasor can scarcely be said to have manifested an intention to convert. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 481, 97 N. E. 43, 46. Also, if an option is followed by a specific devise, a desire not to convert is shown.

[8] 1 Cox Ch. 167.

[9] Townley *v.* Bedwell, 14 Ves. Jr. 590; *In re* Isaacs, [1894] 3 Ch. 506.

[10] Smith *v.* Lowenstein, 50 Oh. 346. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 478, 97 N. E. 43, 45.

[11] See Townley *v.* Bedwell, 14 Ves. Jr. 591, 596; Collingwood *v.* Row, 3 Jur. N. S. 785, 786; Edwards *v.* West, 7 Ch. D. 858, 863; *In re* Walker's Estate, 17 Jur. 706.

[12] Thomas *v.* Howell, 34 Ch. D. 166.

[13] Drant *v.* Vause, 1 Y. & C. Ch. 580; Emuss *v.* Smith, 2 DeG. & Sm. 222; *In re* Pyle, [1895] 1 Ch. 724.

[14] Edwards *v.* West, 7 Ch. D. 858.

[1] The word "navigable" as a term of this rule of law is not necessarily bound up with actual navigability. It is merely a convenient technical term to signify the criterion for the sovereign's ownership of subaqueous land. When used in this technical sense it is often spoken of as "navigable in law." See Miller *v.* State, 124 Tenn. 293–300, 137 S. W. 760, 761; FARNHAM, WATERS, § 38.

owners,[2] the decisions are not uniform as to what tests determine navigability. Under the English rule, only waters affected by the ebb and flow of the tide are navigable in law.[3] In America, many courts have said that the term navigable "includes" any waters in fact suitable for travel.[4] The Supreme court of Tennessee has extended this latter rule to include waters capable of being made suitable for travel. *State* v. *West Tennessee Land Co.*, 158 S. W. 746 (Tenn.).

The cause of this diversity of opinion is probably historical. The English rule that only land under the sea belongs to the crown would seem to be based on reason. The use of the seashore and the right to land, fish, and gather sea animals was considered important in early times. To facilitate this it was necessary that the crown should own the land between the high and low water marks, and it was a natural conception that the land under the sea should belong to the crown. These reasons being inapplicable in the case of inland waters in England, title to land under them was rightly allowed to pass to the riparian owner. As the tidal waters in England are, in fact, the only ones capable of much travel, the courts unfortunately adopted the word "navigable" as a convenient technical term to signify those waters under which the king owns the bed. When the question arose in America some courts, in applying the general rule, seem to have taken the word "navigable" literally;[5] and, considering the meaning given the term in England inapplicable to this country, extended the term "navigable" so as to include the large inland rivers and lakes. One idea in their doing so seems to have been to secure the public a right of way over waters navigable in fact. They seemed unable to reconcile private ownership of the bed with a public right to travel over the water. It seems perfectly clear, however, that this departure was unnecessary if merely to secure the public a general right to navigate. The public can clearly have a right to travel on[6] or fly over[7] land, the fee of which is in private individuals; and a number of courts have allowed the same right over water without considering state ownership of the bed necessary to reach that result.[8]

But in spite of the different opinions prevailing as to what waters are navigable in the technical sense, the actual decisions are not so very much in conflict. Few of them have been direct adjudications of title, and of these, many that have held title to be in the state are explainable by looking to the circumstances connected with the grants.[9] In view

[2] Cobb *v.* Davenport, 32 N. J. L. 369; Lembeck *v.* Nye, 47 Oh. St. 336, 24 N. E. 686; Shively *v.* Bowlby, 152 U. S. 1, 14 Sup. Ct. Rep. 548; Lamprey *v.* Metcalf, 52 Minn. 181, 53 N. W. 1139.

[3] Smith *v.* Andrews, [1891] 2 Ch. Div. 678, 693.

[4] See Heyward *v.* Farmer's Mining Co., 42 S. C. 138, 150, 19 S. E. 963, 970; Hurst *v.* Dana, 86 Kan. 947, 950, 122 Pac. 1041, 1042; Broward *v.* Mabry, 58 Fla. 398, 409, 50 So. 826, 830.

[5] See Johnson *v.* Johnson, 14 Id. 561, 571, 95 Pac. 499, 502.

[6] State *v.* Laverack, 34 N. J. L. 201; Smith *v.* San Luis Obispo, 95 Cal. 463, 30 Pac. 591.

[7] *Cf.* Pickering *v.* Rudd, 1 Stark. 56; Clifton *v.* Viscount Bury, 4 T. L. R. 8.

[8] Treat *v.* Lord, 42 Me. 552; Moore *v.* Sanborn, 2 Mich. 519.

[9] In some cases the deed expressly limits the property by a meander line. Johnson *v.* Knott, 13 Ore. 308, 10 Pac. 418. In Washington the constitution has declared all rights to subaqueous lands to be in the state. Brace & Hergert Mills Co. *v.* State,

of the actual decisions, therefore, a uniform test for navigability seems possible, although the diversity of views expressed by the courts makes such a result improbable. The English rule holding that only land under tidal waters belongs to the sovereign, coupled with a public right to travel over actually navigable waters, is based on reason, is comparatively easy of application, and has been adopted by a number of American jurisdictions.[10] It is submitted that it is much more desirable than a test making land titles depend on the uncertainties as to actual navigability,[11] which is neither based on fundamental reason nor necessary to secure the rights of the public.

RECENT CASES.

ADMIRALTY — TORTS — LIMITATION OF LIABILITY OF FOREIGN SHIP-OWNERS. — The owners of the British steamship "Titanic" petition to limit their liability under the Act of March 3, 1851, U. S. REV. STAT. §§ 4282–4289, for losses resulting from the collision of the ship with an iceberg in mid-ocean. *Held*, that the English, not the American, law governs. *The Titanic*, 49 N. Y. L. J. 685 (U. S. Dist. Ct.).

The limitation of liability for collisions on the high seas in American law is based wholly on statute. In the case of *The Scotland*, 105 U. S. 24, the American statute, as the law of the forum, was held applicable to a collision between an American and an English ship. The law of the forum was also applied where a Belgian and a Norwegian vessel collided. *The Belgenland*, 114 U. S. 355. In both cases, however, exceptions were indicated. If the laws limiting liability for collisions were the same in the countries to which two foreign ships of different nationalities belonged, the law of the forum would yield to the law of the flag; *a fortiori*, if the vessels belonged to the same foreign country. These seem correct on the theory that the same or similar foreign law has followed both ships. Logically, the case of an English ship stranding on English soil comes within such a rule. *Contra*, *The State of Virginia*, 60 Fed. 1018. The case of an English ship, striking an iceberg, is an equally clear case for applying the law of the flag. A broad construction, in substance making the act a mere procedural limitation in favor of all ship-owners sued in federal courts, has been given to the Harter Act, which creates a similar limitation of liability for loss due to faulty navigation. *The Chattahoochee*, 173 U. S. 540. Such an interpretation, however, has never been put upon the Act of 1851.

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42 Wash. 326, 95 Pac. 278. A number of decisions in the northwestern states have been based on the idea that the meander lines of the federal surveys were necessarily the boundaries of riparian property. See Kinkead *v.* Turgeon, 74 Neb. 573, 109 N. W. 744. As to the Great Lakes, it would seem that a reasonable construction of grants conveying property bordering thereon would make the shore line the boundary. In many other cases historical reasons have decided the titles, as, for example, royal grants, etc. But it would seem that decisions of this sort would not be inconsistent with a uniform test for navigability, however conflicting the language used by the courts may be.

[10] Kinkead *v.* Turgeon, 74 Neb. 573, 109 N. W. 744; Cobb *v.* Davenport, 32 N. J. L. 369; Lattig *v.* Scott, 17 Id. 506, 107 Pac. 47; Farris *v.* Bentley, 141 Wis. 671, 124 N. W. 1003; Hardin *v.* Jordan, 140 U. S. 371, 11 S. Ct. 808; Webber *v.* Pere Marquette Boom Co., 62 Mich. 626, 30 N. W. 469; Browne *v.* Chadbourne, 31 Me. 9.

[11] See Hurst *v.* Dana, 86 Kan. 947–964, 122 Pac. 1041–1047.